Supreme Court, U.S.
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No. 01-1772

IN THE

Supreme Court of the United States

THE KEN ROBERTS COMPANY, UNITED STATES CHART COMPANY, KEN ROBERTS INSTITUTE, INC., and THE TED WARREN CORPORATION,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF

RICHARD E. NATHAN
NATHAN LAW OFFICE
123 South June Street
Los Angeles, CA 90004
(323) 931-8080

NEIL A. GOTEINER*
HENRY C. FONG
FARELLA BRAUN & MARTEL LLP
235 Montgomery Street
30th Floor
San Francisco, CA 94104
(415) 954-4400

Attorneys for Petitioners

* *Counsel of Record*

175817

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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CORPORATE DISCLOSURE STATEMENT

Petitioners' Corporate Disclosure Statement was set forth at page *iii* of its Petition for a Writ of Certiorari, and there are no amendments to that Statement.

Respondent's Opposition does little more than paraphrase the erroneous decision of the court of appeals. As a result, it does not address, much less refute, the strong arguments we have made why the Petition should be granted. Nevertheless, two of the points made by the Respondent warrant brief comment:

1. Respondent acknowledges that "the court of appeals did not definitively resolve [the] question" of "the FTC's jurisdiction to regulate" the petitioners' marketing practices. Opp. at 8. Parroting the court below, Respondent asserts that this is justified "because this case is a subpoena enforcement proceeding," in which petitioners have not demonstrated a "*patent* lack of [FTC] jurisdiction." *Id.*; *see id.* at 7-8 (emphasis added). But this is a meaningless standard that finds no support in the decisions of this Court.

Members of the public are entitled to judicial, "protection from unlawful demands made in the name of public investigation, *cf. Federal Trade Comm. v. American Tobacco Co.*, 264 U.S. 298." *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950). For that reason, the courts will not enforce an agency subpoena where, as here, "[t]he evidence sought by the subpoena" is "irrelevant to any lawful purpose" of the agency. *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943). Accordingly, it was the obligation of the FTC to demonstrate — and the obligation of the courts below to determine — that the FTC's "inquiry [was] *within the authority of the agency*" before its Civil Investigative Demands could properly be enforced. *Morton Salt*, 338 U.S. at 652 (emphasis added).

Respondent overlooks or ignores that the instant case is not one in which a question of statutory coverage is among

the issues being investigated. It is in those situations that the courts will broadly recognize the agency's authority to investigate not only evidence of apparent violations but also the facts that may determine its jurisdiction to proceed. *See, e.g.*, *Endicott Johnson*, 317 U.S. at 507-509. As we have previously demonstrated, however, there is no dispute or question here concerning any jurisdictional fact. (*See* Pet. at 23-24.) It is substantially conceded that there is no fact the FTC investigation might uncover that could possibly affect the FTC's lack of authority over the Petitioners marketing activities. In these circumstances, there was no justification for the court of appeals' failure definitively to consider and decide the question of FTC authority and to decide it in Petitioners' favor.

2. Respondent also contends that there is no "clear repugnancy" between the provisions of the FTC Act and those of the CEA and the IAA because neither the CEA nor the IAA "*mandate* that petitioners engage in any unfair act or practice that the FTC Act prohibits." Opp. at 12 (emphasis added). But this "mandate" notion is not the standard this Court has established to determine a "clear repugnancy" between two statutory provisions.

A "clear repugnancy" dictating an implied repeal of earlier legislation must be found where the later statute "*permits* what the first law prohibits." *United States v. Tynen*, 78 U.S. 88, 93 (1870) (emphasis added). As we noted in our Petition, the CEA and IAA both prohibit the use of "any device, scheme, or artifice to defraud any client or prospective client," and conduct that "operates as a fraud or deceit upon any client or prospective client." 15 U.S.C. § 80b-6; 7 U.S.C. § 6*o*. In contrast, the FTC Act prohibits "*unfair*" as well as "deceptive acts or practices." 15 U.S.C. § 45(a)(1) (emphasis

added). Thus, conduct that would not constitute an antifraud violation under the CEA and IAA might nonetheless violate the FTC Act's broader "unfair" standard. Given this "clear repugnancy," it follows that the antifraud provisions of the FTC Act has been impliedly repealed insofar as the conduct of CTAs and investment advisers is concerned. *See* Pet. at 14-19.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD E. NATHAN
NATHAN LAW OFFICE
123 South June Street
Los Angeles, CA 90004
(323) 931-8080

NEIL A. GOTEINER*
HENRY C. FONG
FARELLA BRAUN & MARTEL LLP
235 Montgomery Street
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* *Counsel of Record*